

**A Shangri-La Hotel (KL) Bhd & Ors v National Wages
Consultative Council & Ors**

**B HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO
24–74–11 OF 2015
HANIPAH FARIKULLAH J
10 MARCH 2017**

**C *Labour Law — Employment — Wages — Implementation of the Minimum
Wages Order 2012 pursuant to guidelines issued by National Wages Consultative
Council — Whether guidelines issued by National Wages Consultative Council
intra vires of the National Consultative Council Act 2011 — Whether
interpretation of minimum wage and basic wage should follow guidelines***
**D — *Whether employer entitled to convert service charge to form part of minimum
wage in implementing Minimum Wages Order 2012 unilaterally — National
Wages Consultative Council Act 2011 s 4***

**E The plaintiffs owned and operated hotels and resorts in Malaysia which form
part of the Shangri-La chain of hotels and resorts. The National Wages
Consultative Council was the first defendant and was a council established
pursuant to s 3 of the National Wages Consultative Council Act 2011 ('the
Act'). The second and third defendants were unions for the hotel, bar and
restaurant workers in Peninsular Malaysia and Sabah ('unions'). The Minimum
**F Wages Order 2012 ('the Order') came into force on 1 October 2013 for the
hotel industry, making it mandatory for employers to pay its employees basic
wages that meet the minimum wages requirement which was RM900 for
peninsular Malaysia and RM800 for Sabah, Sarawak and the Federal Territory
of Labuan. The first defendant issued the guidelines on the implementation of
**G the Order and each of the plaintiffs went into negotiations with the unions on
restructuring of wages for the implementation of the Order. The plaintiffs
came up with a proposal which sets out a top-up mechanism to convert part of
the service charge to form part of the minimum wages ('top-up structure').
However, the said proposals were rejected by the unions. Following a deadlock
**H in the negotiations between the plaintiffs and the unions, the plaintiffs referred
the dispute to the Director General of Industrial Relations for conciliation
pursuant to s 18(1) of the Industrial Relations Act 1967. The Director General
convened three conciliatory meetings between the plaintiffs and the unions to
promote an expeditious settlement of the dispute. However, both parties could
**I not reach an amicable settlement. As a result, the Ministry of Human
Resources referred the trade disputes between the plaintiffs and the unions
regarding the implementation of the minimum wage to the Industrial Court
pursuant to s 26(2) of the Industrial Relations Act 1967. The matters of the
trade disputes were pending in the Industrial Court. The Industrial Court**********

granted the plaintiffs' request to adjourn the hearing of the Industrial Court matters pending the outcome of this originating summons. The plaintiffs filed this originating summons seeking for the following declarations: (a) the guidelines on the implementation of the Order issued by the first defendant were intra vires the Act and was issued pursuant to the powers and functions of the first defendant under s 4 of the Act; and (b) the plaintiffs were entitled to use para 3(v) and illustration No 6 of the guidelines on the implementation of the Order issued by the first defendant as an aid of interpretation of the meaning of 'minimum wage' and 'basic wage' under the Act and the Order for the purposes of implementation of the Order; and (c) the plaintiffs were entitled to convert all or part of the service charge for distribution to the employees to form part of the minimum wages for the purposes of the implementation of the Order.

Held:

- (1) The guidelines issued by the National Wages Consultative Council were ultra vires the Act and did not have the force of law. Given the absence of such express provision in the Act to allow the National Wages Consultative Council to issue guidelines, the National Wages Consultative Council therefore had no power to issue guidelines. The fact that the first defendant had conceded that the guidelines were issued in accordance with s 4(2) of the Act did not validate its issue and this question must be decided based on the plain reading of the Act (see paras 17 & 19–21).
- (2) The guidelines could not be used as an aid to interpret 'minimum wage' and 'basic wage' as both terms had been judicially interpreted and had been accepted by the High Court in *Crystal Crown Hotel & Resort Sdn Bhd (Crystal Crown Hotel Petaling Jaya) v Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia* [2017] 9 MLJ 119 (see paras 23–25).
- (3) The guidelines stipulated that it was 'subject to negotiation'. This interpretation was consistent with para 6 of the Order which stipulated that any restructuring of wages was by way of negotiation. Therefore, the plaintiffs could not force the unions to accept the top-up structure if the unions did not agree to the proposal otherwise it would render the clear words of para 6 of the Order and even para 3 of the guidelines redundant (see paras 26–28).

[Bahasa Malaysia summary]

Plaintif-plaintif memiliki dan mengendalikan hotel-hotel dan resort-resort di Malaysia yang bentuk sebahagian cawangan hotel dan resort Shangri-La. Majlis Perundingan Gaji Negara adalah defendan pertama dan adalah satu majlis yang dipertubuhkan di bawah s 3 Akta Majlis Perundingan Gaji Negara

- A 2011 ('Akta tersebut'). Defendan kedua dan ketiga adalah kesatuan-kesatuan untuk pekerja hotel, bar dan restoran di semenanjung Malaysia dan Sabah ('Kesatuan-kesatuan'). Perintah Gaji Minimum 2012 ('Perintah tersebut') berkuatkuasa dari 1 Oktober 2013 untuk perindustrian hotel, di mana ia adalah wajib untuk majikan untuk membayar pekerjaannya gaji-gaji yang
- B memenuhi keperluan gaji minimum iaitu RM900 untuk semenanjung Malaysia dan RM800 untuk Sabah, Sarawak dan Wilayah Persekutuan Labuan. Defendan pertama mengeluarkan garis panduan untuk implementasi Perintah tersebut dan untuk setiap plaintif-plaintif untuk berunding dengan kesatuan-kesatuan dalam menstruktur gaji-gaji untuk implementasi Perintah tersebut. Plaintif-plaintif telah mencadangkan cadangan untuk menetapkan mekanisme *top-up* untuk menukar sebahagian daripada caj perkhidmatan untuk menjadi sebahagian daripada gaji minimum ('struktur *top-up*'). Namun, cadangan-cadangan tersebut ditolak oleh kesatuan-kesatuan. Berikutan
- C dengan kebuntuan dalam perundingan antara plaintif-plaintif dan kesatuan-kesatuan, plaintif-plaintif telah merujuk pertikaian ini kepada Ketua Pengarah Hubungan Perindustrian untuk konsiliasi menurut s 18(1) Akta Perhubungan Perindustrian 1967. Ketua Pengarah mengadakan tiga mesyuarat perdamaian antara plaintif-plaintif dan kesatuan-kesatuan untuk menyelesaikan pertikaian tersebut dengan cepat. Walau bagaimanapun, kedua-dua pihak tidak dapat mencapai penyelesaian yang baik. Akibatnya, Kementerian Sumber Manusia merujuk pertikaian perdagangan antara plaintif dan kesatuan mengenai pelaksanaan gaji minimum kepada Mahkamah Perusahaan menurut s 26(2) Akta Perhubungan Perindustrian 1967.
- D Perkara-perkara pertikaian perdagangan belum selesai di Mahkamah Perusahaan. Mahkamah Perusahaan membenarkan plaintif untuk menengguhkan pendengaran perkara Mahkamah Perindustrian sementara menunggu keputusan saman pemula ini. Plaintif memfailkan saman pemula ini untuk memohon perisytiharan berikut: (a) garis panduan mengenai pelaksanaan Perintah yang dikeluarkan oleh defendan pertama adalah intra vires Akta dan telah dikeluarkan menurut kuasa dan fungsi defendan pertama di bawah s 4 Akta; dan (b) plaintif berhak untuk menggunakan para 3(v) dan ilustrasi No 6 garis panduan mengenai pelaksanaan Perintah yang dikeluarkan oleh defendan pertama sebagai bantuan tafsiran makna 'gaji minimum' dan
- E 'gaji asas' di bawah Akta dan Perintah bagi maksud pelaksanaan Perintah itu; dan (c) plaintif berhak untuk menukar semua atau sebahagian daripada caj perkhidmatan untuk diedarkan kepada pekerja untuk menjadi sebahagian daripada gaji minimum untuk tujuan pelaksanaan Perintah.

I Diputuskan:

- (1) Garis panduan yang dikeluarkan oleh Majlis Perundingan Gaji Negara adalah ultra vires Akta dan tidak mempunyai kuasa undang-undang. Memandangkan ketiadaan peruntukan ekspres dalam Akta untuk membolehkan Majlis Perundingan Gaji Negara untuk mengeluarkan

garis panduan, maka Majlis Perundingan Gaji Negara tidak mempunyai kuasa untuk mengeluarkan garis panduan. Hakikat bahawa defendan pertama telah mengakui bahawa garis panduan itu dikeluarkan mengikut s 4(2) Akta tidak mengesahkan soal ini dan soalan ini mesti diputuskan berdasarkan bacaan lazim Akta (lihat perenggan 17 & 19–21).

- (2) Garis panduan ini tidak boleh digunakan sebagai bantuan untuk menafsirkan ‘gaji minimum’ dan ‘gaji asas’ kerana kedua-dua istilah telah ditafsirkan secara kehakiman dan telah diterima oleh Mahkamah Tinggi di *Crystal Crown Hotel & Resort Sdn Bhd (Crystal Crown Hotel Petaling Jaya) v Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia* [2017] 9 MLJ 119 (lihat perenggan 23–25).

- (3) Garis panduan menetapkan bahawa ia ‘tertakluk kepada perundingan’. Tafsiran ini selaras dengan perenggan 6 Perintah yang menetapkan bahawa apa-apa penyusunan semula gaji adalah melalui perundingan. Oleh itu, plaintif tidak dapat memaksa kesatuan untuk menerima struktur *top-up* jika kesatuan tidak bersetuju dengan cadangan itu jika tidak, ia akan memberikan kata-kata yang jelas dari perenggan 6 Perintah dan juga 3 panduan yang berlebihan (lihat perenggan 26–28).]

Notes

For cases on wages, see 8(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1679–1697.

Cases referred to

Crystal Crown Hotel & Resort Sdn Bhd (Crystal Crown Hotel Petaling Jaya) v Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia [2017] 9 MLJ 119, HC (refd)
Decor Wood Industries (Terengganu) Sdn Bhd v Timber Employees' Union [1990] 1 ILR 423, IC (refd)

Legislation referred to

Banking and Financial Institutions Act 1989 (revoked by the Financial Services Act 2013) s 126
 Environmental Quality Act 1974 s 30B
 Financial Services Act 2013
 Industrial Relations Act 1967 ss 18(1), 26(2)
 Minimum Wages Order 2012 (revoked by the Minimum Wages Order 2016) s 6
 Minimum Wages Order 2016
 National Wages Consultative Council Act 2011 ss 3, 4, 4(1)(e), (1)(g), (2)
Firuz Hussain (Cheng Mai and Choo Shi Jin with him) (Hafarizam Wan & Aisha Mubarak) for the plaintiffs.

Natra Idris (Senior Federal Counsel, Attorney General's Chambers) for the first defendant.
Shireen Ann Selvaratnam (Suriakala a/p Sivalingam with her) (Sreenevasan) for the second and third defendants.

B Hanipah Farikullah J:

INTRODUCTION

C [1] The plaintiffs filed an originating summons seeking for the following declarations:

D (a) the Guidelines on the Implementation of the Minimum Wages Order 2012 issued by the first defendant is intra vires the National Wages Consultative Council Act 2011 and is issued pursuant to the powers and functions of the first defendant under s 4 of the National Wages Consultative Council Act 2011;

E (b) the plaintiffs are entitled to use para 3(v) and illustration No 6 of the Guidelines on the Implementation of the Minimum Wages Order 2012 issued by the first defendant as an aid of interpretation of the meaning of 'minimum wage' and 'basic wage' under the National Wages Consultative Council Act 2011 and Minimum Wages Order 2012 for the purposes of implementation of the Minimum Wages Order 2012; and

F (c) the plaintiffs are entitled convert all or part of the service charge meant for distribution to the employees to form part of the minimum wages for the purposes of the implementation of the Minimum Wages Order 2012.

G THE PARTIES

[2] The plaintiffs own and operate the hotels and resorts in Malaysia which form part of the Shangri-La chain of hotels and resorts.

H [3] The first defendant, NWCC, is a council established pursuant to s 3 of the National Wages Consultative Council Act 2011 ('the NWCC Act').

I [4] The second and third defendants are unions for the hotel, bar and restaurant workers in Peninsular Malaysia and Sabah respectively.

MINIMUM WAGES ORDER 2012 ('THE MWO 2012')

A

[5] The MWO 2012 came into force on 1 October 2013 (vide an amendment to the MWO 2012) for the hotel industry, making it mandatory for employers to pay its employees basic wages that meet the minimum wages requirement stipulated, which was:

B

- (a) RM900 for Peninsular Malaysia; and
- (b) RM800 for Sabah, Sarawak and the Federal Territory of Labuan.

GUIDELINES ON THE IMPLEMENTATION OF THE MWO 2012

C

[6] The Guidelines on the Implementation of the Minimum Wages Order 2012 ('guidelines') were issued by NWCC.

[7] Paragraph 3 of the said guidelines states that:

D

Subject to negotiation between the Employer and employee, the method of restructuring of wages is based on the following conditions:—

- (v) For the hotel sector where the service charge collection is implemented, the employer may convert all or part of the service charge meant for distribution to the employee, to form part of the minimum wages ...

E

[8] Further, the said guidelines also provide an example at illustration No 6 on the restructuring method of converting service charge to form part of the minimum wage for the hotel industry.

F

[9] Each of the plaintiffs went into negotiations with the second and third defendants ('the defendants') respectively on restructuring of wages for the implementation of the order where the plaintiffs came up with a proposal which sets out a top-up mechanism to convert part of the service charge to form part of the minimum wages ('top-up structure'). However, the said proposals were rejected by the defendants.

G

[10] Following a deadlock in the negotiations between the plaintiffs and the second and third defendants ('unions'), the respective plaintiffs referred the dispute to the Director General of Industrial Relations ('DGIR') for conciliation pursuant to s 18(1) of the Industrial Relations Act 1967 ('the IRA'). The DGIR convened three conciliatory meetings between the plaintiffs and the Unions to promote an expeditious settlement of the dispute. However, parties could not reach an amicable settlement.

H

I

[11] As a result thereof, the Ministry of Human Resources referred the trade disputes between the plaintiffs and the unions regarding the implementation of

- A** the minimum wage to the Industrial Court pursuant to s 26(2) of the IRA. The matters of the trade disputes are now pending in the Industrial Court in the following suits (Industrial Court Case Nos 13/3–109/14, 13/3–110/14, 13/3–111/14, 13–3–112/14 and 13/3–113/14). The Industrial Court granted the hotels’ request to adjourn the hearing of the Industrial Court matters
- B** pending, inter alia, the outcome of this originating summons.

WHETHER THE GUIDELINES ARE INTRA VIRES THE ACT

- C** [12] Learned counsel for the plaintiff submitted that based on ss 4(1)(e) and 4(1)(g) read together with s 4(2) of the Act, the Minimum Wages Order 2012 was issued within the powers and functions of the first defendant and thus, is intra vires the Act.

- D** [13] It is important to note that the guidelines relate to the implementation of the MWO 2012 which has since been repealed and replaced with the Minimum Wages Order 2016 (‘the MWO 2016’) that came into effect on 1 July 2016 resulting in minimum wages being further raised from RM900 to RM1,000 for employees in Peninsular Malaysia and from RM800 to RM920 in Sabah, Sarawak and Federal Territory of Labuan.
- E**

[14] As the result of the MWO 2016, the guidelines have also been repealed with effect from 1 July 2016 and there is to be no further restructuring of salaries following the MWO 2016.

- F** [15] The purpose of the originating summons must therefore be limited to the period between 1 October 2013 (when the MWO 2012 came into effect for the hotel industry) and 30 June 2016.

- G** [16] Section 4(1)(e), (g) and 4(2) of the NWCC Act states as follows:

(1) The functions of the council shall be —

(a) ...

- H** (e) to coordinate and supervise, and to evaluate the impact of, the implementation of minimum wages;

(g) to deliberate on all matters relating to minimum wages;

...

- I** (2) The council shall have the power to do all things expedient or reasonably necessary for or incidental to the performance of its functions.

[17] I am attracted by the broad trust of learned counsel for the second and third defendants submissions. I would accept that none of the provisions cited by the plaintiff expressly provide that the NWCC may issue guidelines.

[18] It was rightly pointed out by learned counsel for the second and third defendants that certain legislations such as s 126 of the Banking and Financial Institutions Act 1989 ('the BAFIA') (repealed by the Financial Services Act 2013) and s 30B of the Environmental Quality Act 1974 ('the EQA') expressly provide for Bank Negara and Environmental Quality Council to issue guidelines.

A

B

[19] Given the absence of such express provision in the NWCC Act, in my view the NWCC has no power to issue guidelines.

C

[20] The fact that the first defendant has conceded that the guidelines are issued in accordance with s 4(2) of the NWCC Act does not validate its issue and this question must be decided based on the a plain reading of the NWCC Act.

D

[21] Therefore, in my view the guidelines issued by the NWCC are ultra vires the NWCC Act and do not have the force of law.

WHETHER THE GUIDELINES CAN BE USED AS AN AID TO INTERPRETATION

E

[22] The plaintiffs seek for an order of the court to use the guidelines as an aid to interpret the meaning of 'minimum wage' and 'basic wage' in the NWCC Act and the MWO 2012.

F

[23] The term 'basic wages' has been judicially interpreted as follows:

[1] 'Basic wage' is ordinarily understood to mean that part of the price of labor wherein the employer must pay to all workmen belonging to all categories.

[2] 'Basic wage' does not include additional emoluments

G

...

(See *Decor Wood Industries (Terengganu) Sdn Bhd v Timber Employees' Union* [1990] 1 ILR 423 at p 424 and OP Malhotra's *The Law of Industrial Disputes* (6th Ed, Vol 1) at pp 528–529.)

H

[24] This interpretation has been accepted by the High Court in the *Crystal Crown Hotel & Resort Sdn Bhd (Crystal Crown Hotel Petaling Jaya) v Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia* [2017] 9 MLJ 119.

I

[25] In view of the above, the guidelines cannot be used as an aid to interpret 'minimum wage' and 'basic wage'.

A WHETHER SERVICE CHARGE MAY BE CONVERTED TO FORM
PART OF THE MINIMUM WAGE PAYMENT

[26] The guidelines stipulate that it is ‘subject to negotiation’ which means
that it cannot be unilaterally imposed on the unions.

B

[27] This interpretation is consistent with para 6 of the MWO 2012 which
stipulates that any restructuring of wages is by way of ‘negotiation’.

C

[28] Therefore, the hotel cannot force the unions to accept the top-up
structure if the unions do not agree to the proposal otherwise it would render
the clear words of para 6 of the MWO 2012 and even para 3 of the guidelines
redundant.

D

Order accordingly.

Reported by Lee TJ

E

F

G

H

I